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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 224

VERTEX INVESTMENT COMPANY
(a corporation),
Petitioner,

vs.

NORMA B. SCHWABACHER, etc.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE FACTS.

This was an action filed by petitioner in a California State Court for relief to which petitioner claimed to be entitled under principles of law as administered in California. A demurrer to an amended complaint on the ground that the action was barred by the Statute of Limitations (*California Code of Civil Procedure*, Section 338, subd. 4) was sustained. Judgment was entered on the order sustaining the demurrer and was affirmed by the

District Court of Appeal which heard the case on appeal. Petitioner now seeks to come into this Court on a minor issue by garbing it in the disguise of a constitutional question of due process.[1]

The demurrer to the amended complaint had first been overruled. Three days after receiving notice (R. 127), defendants' counsel wrote a letter to the court, rearguing the case and requesting that "the order of February 20 should be vacated and the demurrer to plaintiff's complaint sustained." (R. 131-132) A copy was sent to petitioner's counsel (R. 142), who immediately replied by a letter to the court in which he did not raise any objection to the court's power of jurisdiction to vacate the order or to enter a new order sustaining the demurrer but, joining issue on the legal questions raised in the defendant's letter, urged that the demurrer should not be sustained (R. 142-146). Further interchange of letters took place, the defendants' counsel writing two, and the petitioner's counsel writing three (R. 147-162), in each of which he argued the merits of the issue of the Statute of Limitations. A few days afterwards the judge ceased to preside in the Law and Motion Department, and shortly thereafter, disposing of all matters submitted to him while he was Law and Motion judge, vacated his order overruling the demurrer and sustained the demurrer without leave to amend (R. 162-163). Pursuant to California practice, judgment was then entered.

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[1]The petition (pp. 4, 5) states that there was a dissenting opinion in the Appellate Court. The dissent, however, was with respect to the merits of the demurrer, and not the question discussed in the petition for certiorari.

It is thus wholly erroneous to say, as petitioner does, that its cause of action was dismissed without giving it an opportunity to be heard. It was fully heard in the court below, both before and after reconsideration was requested. Then it appealed, and the question whether the amended complaint stated a cause of action or was barred by the Statute of Limitations was presented to the District Court of Appeal. Before that tribunal the petitioner had the fullest opportunity to be heard, and was heard, both orally and by lengthy printed briefs.

The question now tendered by petitioner is whether the petitioner was deprived of due process of law in violation of the Fourteenth Amendment.

DISCUSSION.

I.

THE PETITION FOR WRIT OF CERTIORARI HAS BEEN FILED TOO LATE.

The judgment of the District Court of Appeal to which a writ of certiorari is sought was rendered March 1, 1943 (R. 248). It became final, with respect to the District Court of Appeal, within thirty days, and the power of the State Supreme Court to review it expired within sixty days. The judgment thus became final on April 29, 1943 (*Constitution of California,* Article VI, Sec. 4c).[2] Conse-

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[2]Article VI, Section 4c, of the California Constitution provides as follows:

"The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to

quently a petition for writ of certiorari, filed after July 29, 1943 was too late (Title 28, U.S.C., Sec. 350). The petition was not filed until August 3, 1943.

II.

THE ALLEGED FEDERAL QUESTION WAS NOT SPECIALLY SET UP OR CLAIMED BY THE PETITIONER IN THE COURTS BELOW.

The petitioner declares (p. 5) that it "raised this question [of due process under the Fourteenth Amendment] at the first opportunity in the presentation of its bill of exceptions," citing pages 163-166 of the record. This is erroneous. While objecting that the trial judge had no power to change its ruling on demurrer in the manner in which he had done so, the petitioner did not, in its bill of exceptions or elsewhere in the record, invoke the federal constitution. The record nowhere discloses that any "title, right, privilege or immunity [was] specially set up or claimed . . . under the Constitution." (Cf. *American Surety Co. v. Baldwin,* 287 U. S. 156, 77 L. Ed. 231.)

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order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced."

III.

THE PETITION IS WITHOUT MERIT.

We submit that the petition is wholly frivolous.

The petitioner was subject to the jurisdiction of the State Court because, by filing its complaint, it had voluntarily subjected itself to that jurisdiction. No question is here presented such as was involved in the cases cited by petitioner (*Coe v. Armour Fertilizer Works,* 237 U.S. 413, 59 L. Ed. 1027; *Grinbaum v. Superior Court,* 192 Cal. 528, 221 Pac. 635; *Hansberry v. Lee,* 311 U.S. 32, 85 L. Ed. 22), where the complaining party was not the actor and no proper process had been served on him.

The Fourteenth Amendment does not prescribe rules of procedure and practice for state courts or subject to federal review claims of irregularity in local practice or procedure (*Iowa Central Ry. Co. v. Iowa,* 160 U.S. 389, 393, 40 L. Ed. 467; *Louisville & N. R. Co. v. Schmidt,* 177 U.S. 230, 44 L. Ed. 747).

Nothing in the Fourteenth Amendment prohibits the division of state courts into departments, restricts the power of a judge in a given department, or limits his right to pass on a question presented to him in one department after he has been assigned to another (Cf. *Goldsmith v. Prendergast Construction Co.,* 252 U.S. 12, 18, 64 L. Ed. 427). It is the law of California that division of a Superior Court into departments is only for convenience of the dispatch of business, that there is but one court, and that any of its judges may exercise all its power and jurisdiction; exercise by a judge in one department of power

in a case assigned to another is, at best, an irregularity not affecting the jurisdiction or furnishing grounds for reversal[3] except in a situation[4] held not to exist here. (R. 179, second paragraph.)

Petitioner had received service of the demurrer (R. 61). The Fourteenth Amendment does not prescribe how a state court shall pass upon demurrers or restrict the right of reconsideration (Cf. *Moss v. Ramey,* 239 U.S. 538, 60 L. Ed. 425). It is the law in California that a ruling on demurrer is an interlocutory or intermediate ruling and, like a ruling on evidence in the course of a trial, may be considered and changed at any time before the entry of judgment.[5]

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[3]*People v. Grace,* 77 Cal. App. 752, 247 Pac. 585;
City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298;
Graziani v. Denny, 174 Cal. 176, 162 Pac. 397;
Tubby v. Tubby, 202 Cal. 272, 260 Pac. 294;
People v. Martino, 113 Cal. App. 661, 299 Pac. 86;
In re Johnson, 101 Cal. App. 110, 281 Pac. 435;
Haines v. Commercial Mortgage Co., 206 Cal. 10, 273 Pac. 35;
People v. Barbera, 78 Cal. App. 277, 248 Pac. 304.

[4]*Williams v. Superior Court,* 14 Cal. (2d) 656, 96 Pac. (2d) 334.

[5]*De La Beckwith v. Superior Court,* 146 Cal. 496, 80 Pac. 717;
O'Neill v. Hicks, 101 Cal. App. 374, 281 Pac. 531;
City of Los Angeles v. Oliver, 102 Cal. App. 299, 326; 283 Pac. 298;
Howe v. Board of Supervisors, 118 Cal. App. 306, 5 Pac. (2d) 28;
Wrightson v. Dougherty, 5 Cal. (2d) 257, 265; 54 Pac. (2d) 13;
Kelly v. Liddicoat, 35 Cal. App. (2d) 559, 96 Pac. (2d) 186;
Cf. *MacAdoo v. Oregon City Manufacturing Co.,* 9 Cir., 71 F. (2d) 879, 882.

The Fourteenth Amendment does not prescribe the manner or form, or the species of notice, or the quantity of formality, by which a demurrer or other motion is brought on to be heard in a state court. The due process clause is concerned with substance, not form (Cf. *Simon v. Craft,* 182 U.S. 427, at 436; 45 L. Ed. 1165). It is the law of California that even an oral application without formal notice is sufficient;[6] that where an opposing party contests an application, objections concerning notice are waived;[7] and that defects, if any, in proceedings not going to substantial rights of the parties are ignored.[8]

Here the petitioner received notice—by letter—that the defendant requested a reconsideration, and by numerous letters to the judge participated in arguing and contesting the application. If one has actually been heard he may not complain about deprivation of due process (*Lynde v. Lynde,* 181 U.S. 183, 45 L. Ed. 810).

Assuming that the Fourteenth Amendment requires that a litigant in a state court have an opportunity to be heard on every motion or upon any reconsideration by the court of a matter previously argued, there is nothing in the Fourteenth Amendment which prescribes that he shall receive that opportunity in one department instead of in

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[6] *Wrightson v. Dougherty,* supra;
Howe v. Board of Supervisors, supra.

[7] *Simmons v. Simmons,* 45 Cal. App. (2d) 695, 114 P. (2d) 659.

[8] 2 *Cal. Jur.* 1004;
California Code of Civil Procedure, Sec. 475;
Constitution of California, Article VI, Sec. 4½.

another, or that he shall receive it at one stage of the hierarchy of the state courts instead of at another, or that, if he has failed to receive it at *nisi prius,* it is not sufficient that he has received it in an appellate court (Cf. *Wilson v. Standefer,* 184 U.S. 399, at 415; 46 L. Ed. 612; *Bourjois, Inc. v. Chapman,* 301 U.S. 183, 81 L. Ed. 1027). Here, even assuming that the petitioner had failed to receive the opportunity to be heard in the trial court on the question of the sufficiency of its amended complaint, it was fully heard in the appellate court. The question involved, having arisen on a demurrer to a pleading, was solely one of law, and the review of the appellate court was as complete and extensive as the consideration of the trial court. Not until the decision of the appellate court did the judgment become final. It is enough that the sufficiency of petitioner's pleading was determined by an appellate court before which it was fully heard. (*Iowa Central Ry. Company v. Iowa,* 160 U.S. 389, 40 L. Ed. 467; *Louisville & N. R. Co. v. Schmidt,* 177 U.S. 230, 239; 44 L. Ed. 747.)

Petitioner seeks to anticipate the objection that the appellate court has adjudged that it had no cause of action, by stating (p. 10) that it is no answer to say to one who has been deprived of his property without due process that due process would have led to the same result. The statement overlooks the fact that the adjudication occurred after the plaintiff was fully heard by the appellate court. Due process is not concerned with which of the courts of the state grants the hearing.

It is respectfully submitted that the petition is utterly without merit and should be denied.

Dated, San Francisco, California,
August 18, 1943.

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